

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

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|---|---|------------------------|
| XIAFEN CHEN, | : | Case No. 1:19-cv-045 |
| Plaintiff, | : | |
| | : | Judge Timothy S. Black |
| vs. | : | |
| | : | |
| UNITED STATES OF AMERICA, <i>et al.</i> , | : | |
| | : | |
| Defendants. | : | |

ORDER:

**(1) GRANTING DEFENDANT’S MOTION TO STRIKE; AND
(2) DENYING DEFENDANT’S MOTION TO AMEND THE COMPLAINT**

This civil action is before the Court on Plaintiff’s amended complaint (Doc. 12) and contemporaneous motion to amend the complaint as a matter of right (Doc. 13), Defendant’s motion to strike the amended complaint (Doc. 15), and the parties’ responsive memoranda (Docs. 16, 19, 20).

On April 26, 2019, Defendant filed a motion to dismiss Plaintiff’s initial complaint, pursuant to Fed. R. Civ. P. 12(b)(6). (Doc. 8). On May 21, 2019, after the deadline to respond to the motion to dismiss had lapsed, Plaintiff moved “to extend the time to answer, move or otherwise plead in response to Defendant’s Motion to Dismiss,” which motion Plaintiff represented to be unopposed. (Doc. 9). On May 22, 2019, the Court GRANTED the extension of time by notation order, stating as follows:

This civil action is before the Court on Plaintiff’s unopposed motion for an extension of time to respond to Defendant’s motion to dismiss. (Doc. 9). For good cause shown, that motion (Doc. 9) is GRANTED. Plaintiff shall respond to Defendant’s motion to dismiss (Doc. 8) on or before 6/7/19. IT IS SO ORDERED.

(Not. Order, May 22, 2019).

On June 7, 2019, Plaintiff filed an amended complaint (Doc. 12) and contemporaneously filed a motion to amend the complaint as a matter of right (Doc. 13). Plaintiff did not file a formal response to the motion to dismiss.

Defendant moved to strike the amended complaint, stating that its agreement to the extension of time—which requested extension was in and of itself untimely—was premised on the belief that Plaintiff sought additional time to respond in opposition to the motion to dismiss, not to amend the complaint as a matter of right. (Doc. 15). Plaintiff responds to the motion to strike, arguing, in effect, that her motion for extension of time encompassed any form of response, including an amended complaint. (Doc. 19). The Court disagrees.

As an initial matter, regardless of Plaintiff’s intent in moving for an extension of time, the Court’s notation order granted leave to respond to the motion to dismiss, but said nothing of extending the 21-days in which Plaintiff may file an amended pleading as a matter of course, pursuant to Fed. R. Civ. P. 15(a)(1)(B).¹ Moreover, the language of Plaintiff’s motion for extension of time (*i.e.*, “to answer, move, or otherwise plead”) is misplaced in this context, and does not otherwise logically convey a request to extend Plaintiff’s right to amend without leave of the Court. Indeed, neither the Court nor

¹ Pursuant to Fed. R. Civ. P. 15(a)(1)(B), “[a] party may amend its pleading once as a matter of course within ... 21 days after service of a motion under Rule 12(b)” Thereafter, a party “may amend its pleading only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2).

Defendant understood the request as such. Finally, Plaintiff's contemporaneous motion to amend the complaint undermines her assertion that she definitively sought and/or believed she was granted leave to amend as a matter of course. In short, Plaintiff did not properly seek an extension of time to amend her complaint as a matter of course under Rule 15(a)(1)(B), and the time for doing so has long passed.

Accordingly, Defendant's motion to strike the amended complaint (Doc. 15) is **GRANTED**, Plaintiff's amended complaint (Doc. 12) is **STRICKEN**, and Plaintiff's motion to amend the complaint (Doc. 13) is **DENIED**.

However, the Court *sua sponte* establishes a deadline of September 18, 2019, by which Plaintiff may file: (1) a motion for leave to file an amended complaint, pursuant to Fed. R. Civ. P. 15(a)(2); and/or (2) a formal response in opposition to Defendant's motion to dismiss (Doc. 8).

IT IS SO ORDERED.

Date: 8/28/2019

s/ Timothy S. Black
Timothy S. Black
United States District Judge